

FEB 5 1991

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No. 90-929

IN THE SUPREME COURT OF THE UNITED STATES  
October Term, 1990

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STANLEY MARSHALL,  
Petitioner,

vs.

THE UNITED STATES OF AMERICA,  
Respondent.  
-----

Petition for Writ of  
Certiorari to the Court of Appeals  
For the Seventh Circuit

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REPLY TO BRIEF IN OPPOSITION  
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Donald Thomas Bergerson  
2431 Fillmore Street  
San Francisco, CA.,  
94115

Telephone: (415)  
621-8149

Attorney for Petitioner,  
STANLEY MARSHALL



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ARGUMENT

THE PETITION SHOULD BE GRANTED  
AND CONSOLIDATED WITH THE  
CHAPMAN CASE

Respondent has filed a brief requesting that certiorari be held pending decision in Chapman v. United States, 90-5744, cert. granted December 10, 1990 on grounds that this case presents identical issues.

In this unusual case, it might be more appropriate to grant certiorari, for the following reason.



The instant case was consolidated with ~~Chapman~~ for argument and decision in the Seventh Circuit. This makes petitioner a party to ~~Chapman~~ pursuant to Rule 12.4, and petitioner has already filed a brief in that case.

However, because ~~this case~~ is not yet consolidated with Chapman's case, the ~~record~~ here remains in a lower court, [Central District of Illinois, No. 88-30051)]. This may hamper review on the merits in ~~Chapman~~ to the degree that the Seventh Circuit relied on the Marshall record, (which contained substantial expert testimony about the pharmacological character of carrier media in L.S.D. cases), in reaching its decision.<sup>1/</sup>

There is no reason to believe that this Court intended to slice-apart the

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1. Indeed, the "Statement" in Marshall's brief in ~~Chapman~~ is based largely on that testimony.



record underlying the Seventh Circuit en-banc judgment which it agreed to review when it granted certiorari in Chapman. Nor is there reason to suspect that the grant of certiorari in Chapman was intended to place Marshall in the ironic position of being a "party without a case."<sup>2/</sup>

Certiorari is, by definition, the way to certify a record to this Court. Granting certiorari in the instant case will eliminate a procedural oddity, both in this case and in the Chapman case.

Two final points should be mentioned.

First, by requesting certiorari, Marshall is ~~not~~ asking for delay. Should

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2. Indeed, there is reason to believe that until recently the ~~parties~~ to Chapman thought the Marshall record was physically before the Court. Marshall has appended correspondence between the Solicitor General and Chapman's counsel, dated January 4, 1991, indicating that the parties contemplated inclusion of materials from the Marshall record into the Joint Appendix in Chapman, i.e., that the parties believed these materials were part of the record before the Court in Chapman.



certiorari be granted, he is ready promptly to reprint the brief he has already filed in ~~Chapman~~. (with minor revisions as to form), and file it as a petitioner's brief here.

Second, if the Court can bring-up the Marshall record for review in ~~Chapman~~ other than by granting certiorari here, Marshall concurs in the Solicitor General's suggestion that certiorari in this case be "held" pending resolution of ~~Chapman~~.

#### CONCLUSION

Marshall respectfully requests that this Court take such action as is appropriate to certify the record in this case for reasons stated in this brief.

DATED: February 4, 1991

Respectfully Submitted:

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DONALD THOMAS BERGERSON,  
Attorney for Petitioner,  
STANLEY MARSHALL



APPENDIX

(SEAL) U.S. Department of Justice  
Office of the Solicitor General

Washington, D.C., 20530

January 4, 1991

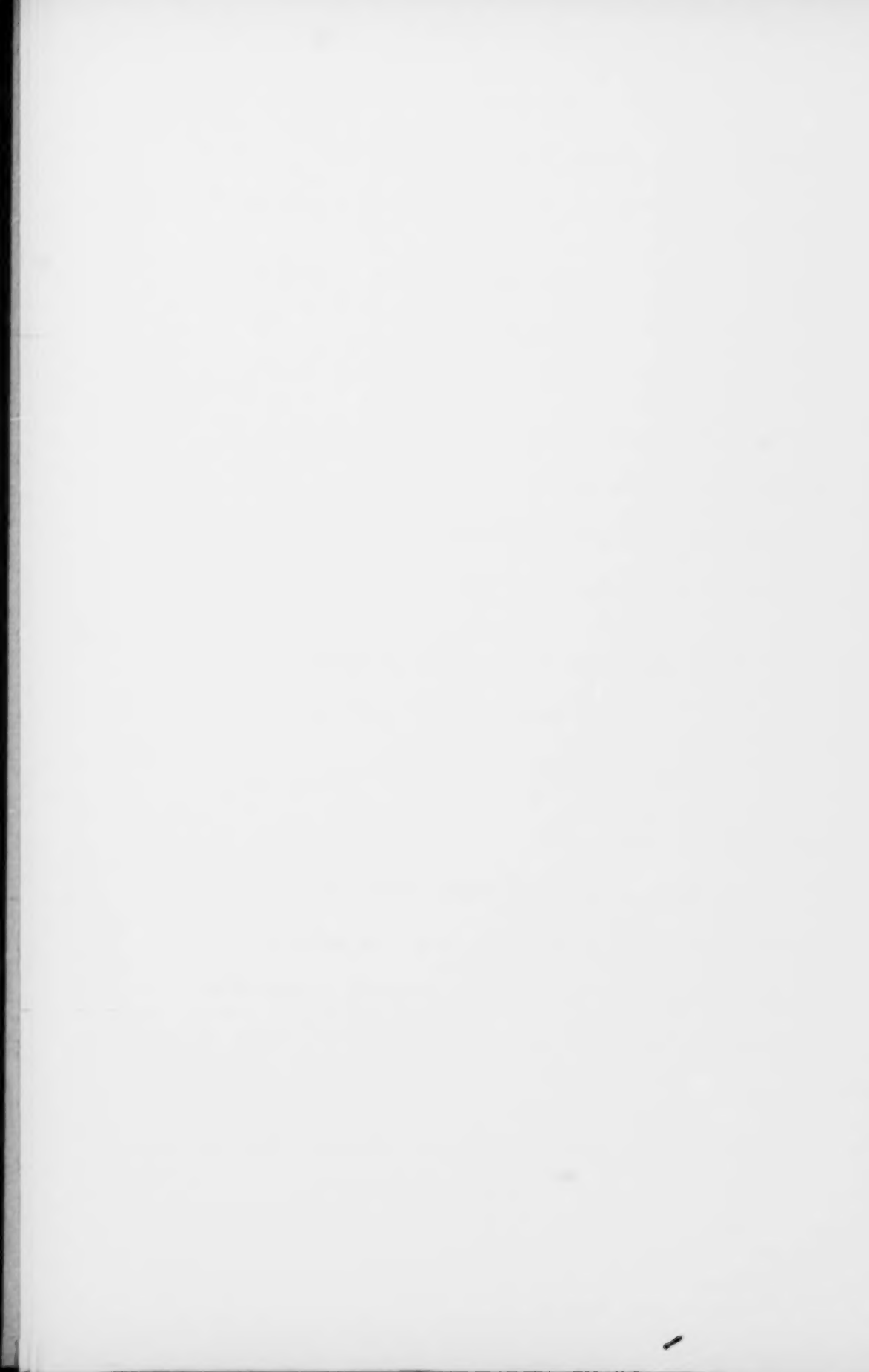
T. Christopher Kelly  
Kelly Law Offices  
121 South Hamilton Street  
Madison, Wisconsin 53703

Re: **Chapman v. United States**  
cert. granted, No. 90-5744  
(December 10, 1990)

Dear Mr. Kelly:

As Mr. Larkin of this Office has discussed with you over the telephone, I wish to designate the following items for inclusion in the joint appendix in this case:

A. From the record in **United States**



v. ~~Chapman~~ et al.:

1. ....

B. From the record in United States v. Marshall:

1. The March 1, 1989, opinion by District Judge Mills;

2. The September 8, 1988, superseding indictment;

3. The February 7, 1989, stipulation;

4. The February 10, 1989, trial transcript, pages 1-91 line 3 inclusive; page 120 line 14 through page 126 line 13;

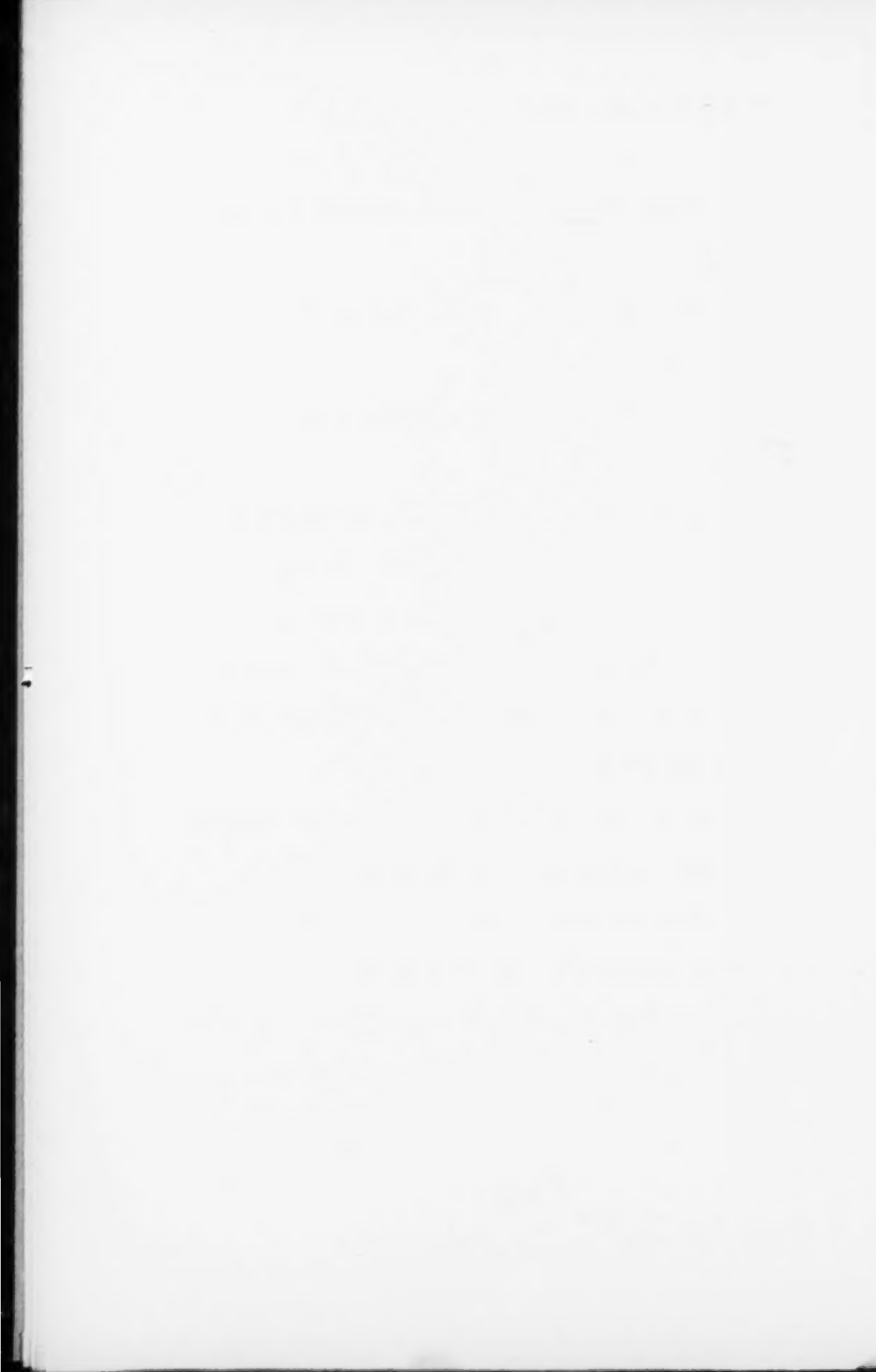
5. The presentence report pages 7-13 paragraphs 10-29.

Please let me know if you need copies of the materials in the Marshall case.

I will contact you if I believe that any other materials should also be designated for the joint appendix. If you have any questions, please contact Mr.

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Larkin of this Office at (202) 514-4132.

Sincerely,

Kenneth W. Starr

Solicitor General

CC: ...

Donald Thomas Bergerson, Esq., ....

Counsel for respondent Marshall